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In the

Supreme Court of the United States

OCTOBER TERM, 1964

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA
Petitioners,

v.

I. E. SCHILLING CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8385

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Petitioner,

v.

I. E. SCHILLING CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, a labor union,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above cause on January 12, 1965, which affirmed a damage judgment rendered in a suit brought under §303 of the Labor Manage-

[1] Aircraft & Engine Maintenance & Overhaul, Building, Construction, Manufacturing, Processing and Distribution and Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

ment Relations Act of 1947, as amended, 29 USC §187.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, rendered January 12, 1965, is reported in 340 F. 2d 286, and is appended at p. 6a, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 12, 1965. The jurisdiction of this Court is invoked under 28 USC §1254(1).

Questions Presented

1.

Is the legality under Section 8(b)(4) of the Labor-Management Relations Act of union's ambulatory ~~picking~~ picketing of an employer to be determined by the same objective standards in a damage suit under Section 303 as are applied to NLRB determinations with respect to the same conduct under Section 10 of said Act?

2.

In the light of the Landrum-Griffin amendments of §303 of said Act, may an employer, having failed to establish through NLRB proceedings the existence of unfair labor practices, recover damages under §303 for the same conduct?

3.

Where a union engages in picketing at a common

situs in strict conformance with *Moore Drydock* standards, may a court or jury infer from such picketing "an object" proscribed by Section 8(b)(4) of the Labor Management Relations Act?

4.

May an employer in a §303 damage suit recover attorney's fees expended in unsuccessful efforts to convince NLRB that union has engaged in unfair labor practices?

Statute Involved

The statute involved and referred to herein is the Labor Management Relations Act of 1947, as amended, pertinent provisions of which are set out verbatim in Appendix A hereto, pp. 1a-5a, *infra*.

Statement

Petitioner, a labor union which represents, among others, employees of ready-mix concrete companies in the vicinity of Miami, Florida, attempted to organize the ready-mix truck drivers employed by Respondent, I. E. Schilling Co., Inc.

In the course of its organizing campaign it picketed Schilling's Miami headquarters and engaged in ambulatory picketing of Schilling ready-mix trucks, following these trucks from Schilling headquarters to numerous construction sites in the Miami area.[2]

One of the construction sites to which Schilling

[2] Approximately fifteen different sites [R. 104-106, 113-114, 124-129, 171-172].

trucks were dispatched was the Eastern Airlines jet overhaul facility, at which the J. A. Jones Construction Company was the general contractor. Large quantities of concrete were used on this project—during the seven month period which preceded the picketing, Schilling alone poured approximately 15,000 yards of concrete.

The Schilling trucks operated as veritable factories on wheels. In the typical operation the Schilling employee drove his mixer-truck on the premises, took it to where the pour was to be made, attached the scoop or scoop sections, turned the pour on and off as necessary, controlled the slump of the concrete as directed by the general contractor's men or by the inspecting engineer, kept a close watch on his water gauges, completed the pour, then drove to a designated area where he discharged the concrete remaining in the drum, washed down his truck, and then drove out of the premises to obtain another load. The Schilling employee remained on the site from ten minutes to more than an hour, depending on the size of the pour [R. 59-60].

On May 16 and May 22, 1962, petitioner picketed the Schilling truck and driver at the Eastern Airline job. At the time of the picketing, Schilling was performing its normal operations on the job site: delivering and pouring concrete into the structure. This was an integral part of the construction operation and required the cooperation and coordination of employees of other contractors working at the

common site, for example, cement masons, hod carriers, iron workers, carpenters, etc.

The picket was located at the single gate used by construction employees, which was as close as possible to the place where the Schilling drivers were pouring their concrete [R. 74, 175].[2] The legend on the picket sign read

"TRUCK DRIVERS
OF
I. E. SCHILLING COMPANY
COME AND JOIN US
TEAMSTERS LOCAL 290"

While the picketing was in progress some 500 to 600 construction workers refused to work and left the job site.

Schilling thereupon filed a charge with NLRB alleging that petitioner union was engaging in unfair labor practices (secondary boycott) proscribed by §8(b)(4), and sought an injunction, through NLRB, under Section 10(1) of the Act. The charge against petitioner was duly investigated by the NLRB Regional Director, but was found to be without merit and therefore was dismissed. Schilling appealed to the General Counsel of the

[2] At each job picketed, the picket tried to enter the premises "to picket right next to the truck," but he was denied entry at the Eastern Airlines job and therefore picketed "the closest point to the truck on the sidewalk, that is, the city property." These facts are undisputed [R. 172-173].

NLRB who affirmed the dismissal, finding [R. 141-142, Def. Ex. 3]:

> "Your [Schilling's] appeal from the Regional Director's refusal to issue complaint with respect to certain portions of the charge in the above case, charging violations under §8 of the National Labor Relations Act has been duly considered.
>
> "This office sustains the ruling of the Regional Director. It was concluded that under the circumstances here disclosed and absent evidence that the Union had engaged in other than primary activity as part of an organizational campaign directed at the charging party's employees, there was insufficient evidence to support a finding that the Union had violated the Act, as alleged. *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 NLRB 547, 549; *Houston Armored Car*, 136 NLRB No. 9. Accordingly, further proceedings were deemed unwarranted."

Having failed to establish through the N.L.R.B. that the union had violated Section 8(b)(4) of the Act, Schilling turned to the District Court and filed the instant suit for damages based upon the same allegations and the same evidence.

The suit also named as defendants the Iron Workers, Hod Carriers, Bricklayers (cement masons) and Steamfitters unions, alleging that they, along with petitioners, "by the aforesaid picketing and by other means, including threats, orders, directions, requests and appeals, induced" Jones' and specified

subcontractors' employees to engage in strike. The jury found for the defendant unions, including petitioner, on this latter allegation.[4] But the jury found against defendant Teamsters Union, petitioner, finding that the object of the picketing at the Eastern Airlines base was

> "to induce the employees working at the Eastern Air base to engage in work stoppages so as to cause the contractor-employers at the Eastern Air Base to cease to purchase concrete mix from the plaintiff."[5]

Accordingly, while finding against Schilling in its claim against the other unions, the jury rendered a verdict for Schilling against petitioner in the sum of $10,411.00 [R. 29], for which amount judgment was entered. [R. 31].[6]

By motion for directed verdict [R. 152], by Motion for Judgment N.O.V., [R. 32], and by Defendants' requested instruction No. 2 [R. 24-A], peti-

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[4] In response to Interrogatory No. 1, the jury expressly found that the defendant unions did not engage in a common purpose to require the employer at the Eastern Air Base to refuse to deal with Schilling [R. 28]. A verdict was directed for the Bricklayers [R. 221], and all of the other defendants, with the exception of petitioner Teamsters Union, were exonerated by the jury and judgment was entered in their favor [R. 32].

[5] R. 28, Interrogatory No. 2. There was no evidence, however, except the fact of picketing, to support this finding as to object. Schilling had sworn to the NLRB that the object was to force union recognition. [R. 110] Schilling's witness testified that he understood that the object of the picketing was to force union recognition [R. 144], and the picketing ceased immediately upon Schilling's filing for an NLRB election. [R. 201].

[6] The Court of Appeals required a remitter (sic) of $2,161.73. [R. 231]. Schilling has remitted that sum, accordingly the judgment stands affirmed in the amount of $8,249.27.

tioner asserted that the undisputed evidence showed that all of the picketing "(1) was limited to times when the situs of the dispute (the Schilling truck and driver) was located on the premises where picketing occurred, (2) occurred when Schilling was engaged in its normal business at the situs, (3) took place reasonably close to the situs, and (4) clearly disclosed that the dispute was only with Schilling," thus meeting the *Moore Dry Dock* standards by which the legality of ambulatory picketing is to be tested under the Act. The trial court overruled the contention and entered judgment against petitioner.

The trial court also overruled petitioners' objection to charging the jury in the literal language of the statute (R. 209-210) as being foreclosed by the holding of this Court that "this provision [of the Act] could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity." *Local* 761 *v. NLRB* (*General Electric*), 366 U.S. at 672 [R. 209, 217].

On appeal the Fifth Circuit noted the contention that the "picketing activities were, as a matter of law, legal and not proscribed," [R. 326] but held on the authority of its own decisions in *Brown Transport v. NLRB*, 334 F. 2d 30 (C.A. 5, 1964) and *Superior Derrick Corp. v. NLRB*, 273 F. 2d 891 (C.A.

5, 1960), that "the proof was sufficient to create issues for the jury." [R. 230], and affirmed.[7]

Thus, petitioner is here held in damages for engaging only in lawful ambulatory picketing which NLRB refused to enjoin, and which met each of the tests of legality specified in the NLRB *Moore Dry Dock* decision and approved by this Court in *Local 761, IUE v. NLRB*, 366 U.S. 667.

Reasons for Granting the Writ

1.

Both NLRB and this Court have expressed objec-

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[7] This is not a case in which the jury has resolved testimonial controversies. The facts are undisputed—though the Court of Appeals in its rendition of the facts in twelve numbered paragraphs, Slip Opinion, pp. 3-6, records certain matters which are either immaterial, because not affecting the picketing, or contrary to the undisputed evidence, e.g.:

Immaterial: The reference to the Maule contract (¶s #2&3), since it was undisputed that petitioner had no knowledge of the cancellation of the Maule contract (R. 205); the timing of the picketing had no relationship to the timing of such cancellation, (R. 116-118), and the picketing ceased long before Schilling was terminated, and without petitioners having knowledge of the termination (R. 113, 201).

The reference to the picket not being visible to the Schilling driver (¶ #6). This was due to the picket's having been denied access to the job site, and the buildings cut off the view (R. 133)—exactly the same situation which prevailed in *Moore Drydock*, 92 NLRB 547, 554.

The reference to the activity of the other crafts (¶ #10) is immaterial (and contrary to the jury finding). Note the jury's exoneration of these defendants, and the finding that they did not act with petitioner in a common purpose. (Interrogatory # 1, R. 28, cf. R. 32).

Contrary to the undisputed evidence: The suggestion that the picketing was not taking place at the Schilling plant at the same time the Schilling truck was being picketed at the Eastern site (¶ #7, See undisputed evidence, R. 160, 161, 164, cf. R. 76 and 79).

The assertion that picketing at other jobs was conducted in a different manner (¶ #11). Actually, picketing at all jobs followed the same pattern. (R. 104-106, 113-114, 124-129, 171-172). There was no evidence that a picket ever left any job before the Schilling truck left, and Schilling admitted that ready mix trucks were picketed at numerous other job sites even where no employees quit work (R. 81, 103, 104, 126, 175, 183).

Thus, the only facts upon which the jury could draw inference as to the "object" of the picketing were the facts which constituted compliance with *Moore Drydock* standards.

tive standards by which the validity of ambulatory picketing is to be determined. Both have recognized the "protected" status of primary picketing. The Board in evolving and applying the above specified *Moore Drydock* tests by which primary is to be differentiated from secondary picketing ". . . set out four standards for picketing in such situations which this Court held would be *presumptive of valid primary activity.*" *Local* 761 *v. NLRB* (*General Electric*), 366 U.S. at 677 (Emphasis added).

Yet the Courts below permit a jury to substitute its view of the union's subjective intent, even where the established objective standards have been scrupulously followed. The result is to demolish the "protected" right of primary picketing by making workers liable in damages for its exercise.

In a series of cases the Fifth Circuit has demonstrated a reluctance to apply established presumptions of validity to such activity, both by overturning NLRB applications of the established presumptions;[8] and by permitting district courts to impose damage judgments against workers who do no more than engage in primary picketing in strict accordance with the established presumptions.[9]

Because of such decisions workers throughout the Fifth Circuit find that their "protected" right to engage in primary picketing at a common situs,

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[8] *Superior Derrick v. NLRB*, 273 F. 2d 891 (C.A. 5, 1960); *Brown Transport Corp. v. NLRB*, 334 F. 2d 30 (C.A. 5, 1964).

[9] The instant case and *Aircraft Union v. Oolite*, 341 F. 2d 210, (C.A. 5, 2/2/65) are examples.

consistently vindicated by NLRB in Section 10 proceedings, is non-existent in a §303 damage suit.

The Fifth Circuit denies workers the right to follow the primary employer with whom they are in dispute and picket that employer at the locale at which he conducts his business in cooperation with other employers. *Superior Derrick Corp. v. NLRB,* 273 F. 2d 891 (C.A. 5 1960); *Brown Transport Corp. v. NLRB,* 334 F. 2d 30 (C.A. 5, 1964); *Aircraft etc. Union v. Oolite,* 341 F. 2d 210, (C.A. 5, February 2, 1965), and the opinion below all flatly deny to workers the rights which NLRB has held protected in *Moore Dry Dock,* 92 NLRB 547, *Houston Armored Car,* 136 NLRB 110, *Plauche Electric,* 135 NLRB 250, *New Power Wire, etc.,* 144 NLRB No. 100, and *Combustion Associates,* 144 NLRB No. 111. A union which scrupulously patterns its conduct of common situs picketing after NLRB determination of legality, or in accordance with NLRB precedent, nevertheless pickets at its peril if a jury may make subjective findings of illegal intent and accordingly award damages under §303.

This Court in *Local* 761 *v. NLRB* (*General Electric*), 366 U.S. 667 (1961), and *United Steelworkers v. NLRB* (*Carrier*), 376 U.S. 492 (1964), was explicit in its determination that ". . . Congress not only preserved the right to strike; it also saved primary picketing from the secondary ban. . . , Congress intended to preserve the right to picket . . . a gate reserved for employees of neutral deliverymen furnishing day-to-day service essential to the plant's regular operations." 376 U.S. at 499.

The former case (*General Electric*) specifically approved the so-called *Moore Dry Dock* tests formulated by NLRB to accomplish "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own," 366 U.S. at 679. At the same time this Court's opinion in *General Electric* singled out the Fifth Circuit's *Superior Derrick* opinion as an example of misapplication of the statute, 366 U.S. at 678. Nevertheless, the Fifth Circuit continues to follow, indeed specifically cites as authority for both the instant opinion and for *Brown Transport,* the discredited *Superior Derrick* case.

This case thus presents the anomolous situation where the very primary picketing activity which NLRB and this Court hold protected by the federal Act in §10 proceedings (29 USC §160) becomes unlawful and the basis for an award of damages in an action brought under §303 (29 USC §187) of the same statute.

2.

This case presents the first opportunity this Court has had since the 1959 Landrum-Griffin Amendments to determine the effect of those amendments as to the statutory scheme of enforcement in the relationship of administrative and court adjudication.

Prior to the 1959 amendments §§8(b)(4) and 303 defined in identical language the proscribed boycott activities. Violation of the former led to administrative order, enforceable in the Court of Appeals. Violation of the latter was the basis for district court action and damage award.

Under the prior Act it was held that conflicting findings in the two separate proceedings could each stand; and that each fact finding agency was entitled to make its own decision. Thus, an NLRB finding that picketing was primary and lawful was affirmed at the same time a damage award based on a district court jury's finding that the very same picketing was "secondary" and thus unlawful was likewise affirmed. *United Brick & Clay Workers v. Deena Artware,* 198 F. 2d 637 (C.A. 6, 1952); *NLRB v. Deena Artware,* 198 F. 2d 645 (C.A. 6, 1952). Cf. *International L. & W. Union v. Juneau Spruce,* 342 U.S. 237 at 244 (1952).

The result under the former statute in *Deena* has been severely criticized in the law journals. While eschewing mechanical and absolute application of the primary jurisdiction doctrine to the complete ouster of court action, Professor Louis Jaffee notes in "Primary Jurisdiction," 77 Harv L.R. 1037 at 1052, that: "presumptively a legal system should insofar as possible avoid contradiction, and the complacency with which the (Sixth Circuit) court

in *Deena* rationalizes its result does it little credit."[10]

Though the legislative history on the point is sparse, Congress must have had reason in its Landrum-Griffin revisions for deleting the detailed specification of the proscribed activity in §303(a) (29 USC §187(a))" and substituting instead the requirement that no labor organization shall "en-

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[10] 71 Harv at 1052. Professor Jaffee continues:

"At least in *Deena* both orders *could* be enforced: the union could pay damages and the employer reinstate his employees. A much more clearly intolerable point comes when a party is ordered to do contrary things, for example, to recognize and not to recognize a union. In either case the simplest and best solution will often be for the second forum to accept the conclusion of the first to decide." (Citing cases.)

[11] The 1947 Act contained the following language, which was repealed by the Landrum-Griffin Amendment (§303, *infra*, Appendix, pp 3a-5a):

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act.

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act.

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

gage in any *activity or conduct defined as an unfair labor practice* in section 158(b)(4)." The Board's *exclusive* competence to ascertain the existence of unfair labor practices has been clear since the days of the Wagner Act. See Section 10(a), 29 U.S.C. §160(a). Congressional excision of detailed specification of the basis for damage award, and substitution of reference to "unfair labor practices," as to which the Boards' competence is exclusive, is strong indication of Congressional intent that prior resort to the Board is a necessary predicate for damage action.

The importance of allowing *the Board* to determine the existence of unfair labor practices, especially as to §8(b)(4)(A), was emphasized by Justice Frankfurter in the *General Electric* case, 366 U.S. at 674.

> "The nature of the problem, as revealed by unfolding variant situations, inevitably involves in evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply §8(b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. *'One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.'* Republic Avi-

> ation Corp. v. NLRB, 324 US 793, 800, 89 L ed 1372, 1378, 65 S Ct 982, 157 ALR 1081." (Emphasis added)

Accordingly, it would appear that under the amended statute resort to NLRB's primary jurisdiction to establish that the "activity or conduct [is] defined as an unfair labor practice" is prerequisite to the damage suit.

3.

The difficult and oft recurring problem of making a balance between workers' right to primary picketing and the interest of a "secondary" employer to be free from picketing, has plagued NLRB and the Courts since the enactment of the Taft-Hartley Amendments in 1947. As this Court has noted the NLRB "modified and reformed its standards on the basis of accumulating experience,"[12] and concluded that when [as here] the situs of the primary employer was "ambulatory" there were four objective standards to be applied in determining whether the challenged picketing was primary and therefor lawful, viz:

> (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer.

[12] 366 U.S. 66, 375.

This Court specifically approved these objective standards in *General Electric* and *Carrier*, and since those decisions a definitive line has been drawn by which the "primary" or "secondary" nature of the picketing may be ascertained. The Fifth Circuit refuses to observe this line. Instead, it continues to hold that it is the function of the fact finder to ascertain the picketers' subjective intent; and that a proscribed "secondary" intent or objective may be inferred from the mere fact of picketing.

This view in the Fifth Circuit reverts to a literal reading of the statute which this Court held *"could not be literally construed"* (*General Electric* 366 U.S. at 672, emphasis added). Even worse, under the guise of permitting a jury to determine the "object" of the picketing, it permits a jury, instructed in the literal language of the statute, to improvise its notion of the "object" of the picketing, without regard to the guides by way of objective presumptions which this court has held must be applied in the enforcement of the statute.

Through eighteen years of experience with the statute, NLRB and this court have arrived at the point where picketing in accordance with *Moore Drydock* standards is primary, and thus lawful, as a matter of law. And primary picketing remains primary, and lawful, despite its secondary effects and despite the "intention" or "hope" of the picketers that all who observe the picket will cease aiding the employer involved in the primary dispute. See *United Steelworkers v. NLRB*, 376 U.S. at 498-499, especially Text at footnote 6.

4.

In any event, rules of law established by NLRB decisions and approved by this Court as to what conduct constitutes an "unfair labor practice" ought to be controlling in a district court inquiry as to the existence of the self same "unfair labor practice."

This Court has reiterated in other contexts the necessity for the establishment of a coherent federal common law of collective bargaining "which the courts must fashion from the policy of our national labor laws" *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). If, as the *Lincoln Mills* case states: "The Labor Management Relations Act expressly furnishes some substantive law," that substantive law cannot mean one thing when applied by NLRB, and another when applied by a court. Yet the holding below inflicts a large damage award against workers solely for conduct which NLRB would not enjoin.

5.

The damage award charges union for attorney fees expended by Schilling in its unsuccessful effort to obtain NLRB action and injunction under §10(1), 29 USC §160(1). We thus find the anomaly of employer being held entitled to recover attorney's fees for its unsuccessful efforts to obtain an injunction against the picketing, based on the 8(b)(4) charge which the NLRB General Counsel found to be worthless. Surely this is not "the damages by him

sustained" which the statute, §303(b), 29 USC §187(b), awards.

CONCLUSION

For the foregoing reasons, writ of certiorari should be granted herein.

Respectfully submitted,

DAVID PREVIANT
L. N. D. WELLS, JR.
CHARLES J. MORRIS

April 11, 1965.

APPENDICES

APPENDIX A

Statutory Provisions

The relevant provisions of the Labor Management Relations Act of 1947, as amended, are as follows:

Section 8(b) [29 U.S.C. §158(b)]:
"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease

doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;" [73 Stat. 542]

Section 10 [29 U.S.C. §160]:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. . . ."

Section 303 [29 U.S.C. §187]:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title. [73 Stat. 545.]

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." [61 Stat. 158.]

THE STATUTE AS AMENDED

Section 303 as originally enacted in 1947 is set out below, with the portions which were eliminated by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, being enclosed by brackets; provisions added by the 1959 Act are in italics; and unchanged portions are shown in roman type.

Boycotts and Other Unlawful Combinations

SEC. 303. (a) It shall be unlawful, for the purpose[~~s~~] of this section only, in an industry or activity affecting commerce, for any labor organization to engage in[~~, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is~~]

[(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;]

[(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;]

[(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;]

[(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other

~~than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.]~~

any activity or conduct defined as an unfair labor practice in section 8(b)(4) *of the National Labor Relations Act, as amended.*

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20920

AIRCRAFT & ENGINE MAINTENANCE & OVERHAUL, BUILDING, CONSTRUCTION, MANUFACTURING, PROCESSING AND DISTRIBUTION AND ALLIED INDUSTRIES EMPLOYEES, LOCAL 290, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN & HELPERS OF AMERICA,

Appellant,

versus

I. E. SCHILLING CO., INC.,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(January 12, 1965.)

Before JONES and BELL, Circuit Judges, and HUNTER, JR., District Judge.

HUNTER, District Judge: Section 303 of the Labor Management Relations Act, 29 U.S.C.A. §187, gives the employer a cause of action for damages against a union that engages in a secondary boycott

in violation of Section 8(b)(4)(B) of the National Labor Relations Act.[1] Schilling, a ready mix cement company, brought this action in the district court under that provision after the Teamsters Local had picketed its trucks at a neutral construction site where the cement was being poured. A jury verdict was returned in favor of Schilling in the sum of $10,411. Judgment was entered on the verdict.

The question here, in simple terms, is: Was the conduct of the union and the picketing which took place at the gate to the job site done with the object of forcing or requiring Jones to cease doing business with Schilling? In answer to a specific interrogatory holding that the picketing had no other rogatory the jury said "yes." The jury answered another interrogatory, holding that the picketing had no other object. The broad question presented by this appeal is whether the evidence was sufficient to present a factual question for the jury. Appellant contends that its picketing activities were, as a matter of law, legal and not proscribed. The dividing line between forbidden secondary activity and protected

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[1] Section 8(b)(4) of the Labor Management Relations Act, as amended, makes it an unfair labor practice for a union or its agents:

"(i) to engage in, or to induce or encourage any individual employed by any persons engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing * * *" 29 U.S.C.A. §158(b)(4)(A, B).

primary activity has been the subject of intense litigation both before and after the 1959 amendments to 8(b)(4), which broadened the coverage but also added the express exception that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." We need not detail the course of this sometimes complex litigation. It suffices to say that the object of picketing is not something which can always be evaluated mechanically. The very nature of the problem as illustrated by the jurisprudence reveals that for the facts of this case there is no definitive rigid formula which can be accepted as conclusive. (*Local* 761, *I.U.E. v. N.L.R.B.*, 366 U.S. 667, 6 L. Ed. 2d 592, 81 S. Ct. 1285; *Brown Transport Corp. v. NLRB*, 5 Cir., 1964, 334 F. 2d 30; *Superior Derrick Corp. v. NLRB*, 5 Cir., 1960, 273 F. 2d 891).

Having in mind that on appeal the evidence and all inferences therefrom must be viewed in the light most favorable to the prevailing party and in support of the jury verdict, the facts may be set forth as follows:

1. On October 3, 1961, J. A. Jones Construction Company commenced work on a project in Miami, Florida, known as the Eastern Air Lines major jet overhaul facility. Jones employed subcontractors to perform portions of the work. Total employment on the job approximated 600 men. All these personnel belonged to labor organizations and the job was considered to be "100% union," except for appellee.

2. As subcontractors for ready-mixed concrete, Jones chose two suppliers—Maule Industries, which had a collective bargaining contract with the appellant Teamsters Union; and Schilling, who had no contract with any union and was considered non-union. Both of these companies commenced servicing the job in the latter part of October, 1961.

3. As the deliveries continued, J. A. Jones became dissatisfied with the service of Maule Industries, but was well pleased with the service furnished by Schilling. Jones cancelled Maule Industries' contract.

4. Schilling was advised that henceforth, it would supply the entire job requirements of ready mixed concrete. Thereafter, Schilling made only six deliveries before trouble developed.

5. On May 16, 1962, at about 7:55 A.M., two pickets appeared at the job site. One was the president of the Union. The other had been employed for the sole purpose of picketing. The picketing commenced as Schilling's truck entered the job site. The sign carried stated: "Truck Drivers of I. E. Schilling Company, come and join us. Teamsters' Local 290."

6. While on the job site, Schilling's truck drivers and trucks were not visible to the pickets and the effect of the picket sign on Schilling's drivers was limited to the time it took the driver to go through the gate.

7. On this first morning of picketing, Appellee's president, Schilling, had driven from his plant, less than a mile away directly to the J. A. Jones job. The Schilling plant at that specific time was not being picketed. This plant was Schilling's primary place of business and picketing could readily be carried on there and was, periodically.

8. Schilling watched his first truck arrive and saw the two pickets emerge from cars. As the picketing continued, all "crafts" left the job, in number between 500-600 men.

9. Jones delayed further pours until approximately one week later, May 22, 1962. On that date Schilling arrived at the J. A. Jones job site 15-30 minutes before his truck was scheduled to arrive. At the job site, he noted a picket already waiting; the picket was sitting in an automobile. When the truck entered the job site, the picket emerged and commenced picketing. Again, there was a general work stoppage, with 500-600 men leaving the job.

10. The next morning, a group of job stewards, representing a number of building trades unions whose members were employed on the job, met with the J. A. Jones, project manager.[2] They stated "the men would not work on the job while J. A. Jones was puoring concrete with those trucks, and they wanted assurance * * * (that J. A. Jones) * * * would stop pouring with those trucks.[3]

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[2] Appellant Teamsters was a member of the Building Trades Council.

[3] This meeting, and certain other evidence, was the basis for inclusion of bricklayers, ironworkers, laborers and pipefitters in the complaint. The District Court directed the verdict for the bricklayers and the jury found in favor of the remaining three building trades unions.

The project manager, knowing that the only method of getting his job going again was to remove appellee Schilling, sought another supplier, Acme Concrete, after assuring himself that Acme used Appellant Teamsters drivers.

11. During the period between the first picketing at J. A. Jones—May 16—and the second picketing—May 22—appellant picketed other jobs being serviced by Schilling. However, this picketing was conducted in quite a different manner. Thus, an appellant picket would appear on a job, picket for a time, but when he found that no secondary employees walked off, he would leave. Similarly, when a job had once been picketed and no walkout by secondary employees occurred, that job would not be revisited bp the picket.

12. The purpose of picketing at the plant and jobs of Appellee (according to Appellant) was "* * * in the hopes that it (would) embarrass the employer to the extent that he (would) file a charge and a petition for an election * * *."

A review of the record, and especially the facts heretofore recited, discloses that the proof was sufficient to create issues for the jury. These issues were submitted on a clear and correct charge. This Court's function as to a resolution of those issues was exhausted when, as here, an evidentiary basis was apparent.

Appellant vigorously argues that "the N.L.R.B. dismissal of the 8(b)(4) charges is res judicata

and/or collateral estoppel to this action under Section 303a."

Here, there was no adjudication by the Board. Schilling filed a charge. The general counsel declined to issue a complaint. Surely, the mere refusal by the general counsel to issue a complaint is not res judicata and can not constitute a collateral estoppel. The failure of the general counsel to issue a complaint is not necessarily based on the evidence or the merits of a case. (*Dunn v. Retail Clerks' International Association,* 307 F. 2d 285, 6 Cir. 1962). To dismiss a damage suit on the proposition that the general counsel had refused to proceed would be to deny to the employer his day in court in clear contradiction to the requirements of Section 303 of the Act.

The trial court submitted a special interrogatory and thus determined that the jury included $3,846.00 as attorney's fees in its damage award. We agree with appellant that there was no proof to support this award. This is true because the record clearly reveals that the sum total of attorney's fees was $1,684.27. This amount would have been recoverable. (*Local Union 984, International Brotherhood of Teamsters, etc. v. Humco,* 287 F. 2d 231, 6 Cir. 1961). Although the record reveals a fair and impartial attitude by the presiding judge, in denying the motion for a new trial there was a failure on his part to recognize the disparity between the proof and the jury's award on the question of attorney's fees, which technically consti-

tuted an abuse of discretion amounting to an error of law. However, we are of the opinion that justice will better be served if, instead of now remanding the cause for a new trial, we give appellee, in lieu of such remand, the opportunity of remitting the amount of $2,161.73.[4]

The judgment will stand remanded for a new trial, unless appellee files a remittur within thirty days in this court for $2,161.73, in which event the judgment will stand affirmed (28 U.S.C.A. 2106;[5] *Texas Company v. Christian,* 5 Cir., 1949, 177 F. 2d 759; *U.S. v. Certain Parcels of Land,* 5 Cir., 1945, 149 F. 2d 81; *Boyle v. Bond,* 187 F. 2d 362, Circuit Court of Appeals, District of Columbia; *Boucher v. Krause,* 7 Cir., 1953, 200 F. 2d 576, cer. denied 345 U.S. 997.)

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[4] This is the difference between the $3,846 awarded by the jury and the $1,684.27 which is in conformity with the evidence.

[5] Title 28 U.S.C.A. 2106 provides that an appellate court "may affirm, modify, vacate, set aside or reverse" any judgment "brought before it for review" and "may remand the case and direct entry of such appropriate judgment * * * or require such further proceedings to be had as may be" justified.